Supreme Court, U.S.
FILED
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No. 93-251

In The

Supreme Court of the United States

October Term, 1993

HENRY J. GUIDRY, JR. and
HENRY C. MELIUS,

Petitioners,

versus

MISSISSIPPI UTILITY, INC., PETER J. CASANO, M. P. McLEAN, HOBART G. TRUESDELL, ARTIS E. JAMES, JR., ABC INSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

Reply and Objections to Respondents' Statement of the Case 1

Summary of Judgment Below 3

Argument 3

Conclusion 5

TABLE OF AUTHORITIES

CASES

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194 (1988) 1

Lumbermen's Mut. Cas. Co. v. Rhodes, 403 F.2d 2 (10th Cir. 1968), *cert. denied*, 394 U.S. 965, 89 S.Ct. 1319, 22 L.Ed.2d 567 1

Purcell Co., Inc. v. Mississippi State Tax Commission, 569 So.2d 297 (Miss. 1990) 2

School Asbestos Litigation (In re), 977 F.2d 764 (1992) 1

Transit Cas. Co. v. Security Trust Co., 396 F.2d 803, *cert. denied*, 89 S.Ct. 635 (Ca. Fla. 1968) 3

OTHER AUTHORITIES

28 U.S.C. § 455 ..... 1, 3

28 U.S.C. § 636(c) 1

F.R.C.P. Rule 23, 28 U.S.C.A. 1

F.R.C.P. Rule 15, 28 U.S.C.A. 3

F.R.C.P. Rule 16(b), 28 U.S.C.A. 3

TABLE OF AUTHORITIES – Continued

Page

F.R.C.P. Rule 41(b), 28 U.S.C.A. 3

F.R.C.P. Rule 60(b)(2)(3)(6), 28 U.S.C.A. 4

REPLY AND OBJECTIONS TO RESPONDENTS' STATEMENT OF THE CASE

1. Since John M. Roper's reappointment as United States Magistrate Judge and unsuccessful quest for an appointment as United States District Judge was supported by Walter J. Gex, III, his disqualification must be viewed objectively. 28 U.S.C. § 455.[1]

2. Order of Reference dated May 15, 1990, pursuant to 28 U.S.C. § 636(c) (App. 76 and 77), was aborted by the Clerk of Court without written consent of parties on December 20, 1991 (App. 78), and litigation was reassigned to United States District Judge Bramlette prior to final judgment filed on September 25, 1992 (App. 25 and 78).

3. Addressing petitioners' failure to go forward after denial of class certification as required by F.R.C.P. Rule 23, 28 U.S.C.A.,[2] corporate entity Diamondhead Utility Co., Inc. ("Utility") was well known to Judge Roper as early as April 9, 1991 (App. 79). It is noted that all memorandua are filed directly with Judge Roper without circulation to opposing counsel (App. 82) and never released, but remains the property of Judge Roper or the Clerk of Court (App. 83).

On May 15, 1990, Judge Roper agreed to permit Utility to be a party defendant (App. 84 and 85). Petitioners

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[1] *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 108 S.Ct. 2194 (1988); *School Asbestos Litigation (In re)*, 977 F.2d 764 (1992).

[2] *Lumbermen's Mut. Cas. Co. v. Rhodes*, 403 F.2d 2 (10th Cir. 1968), *cert. denied*, 394 U.S. 965, 89 S.Ct. 1319, 22 L.Ed.2d 567.

submitted an Order on October 4, 1991 (App. 18) for Judge's signature to amend Complaint designating Purcell Co., Inc., Utility and Diamondhead Utilities as party defendants. Mr. Gillespie informed Judge Roper that He (Mr. Gillespie) would sign an Order with Purcell only as a party defendant (App. 24). It is my understanding that Judges sign Orders – not counsel.

4. United States District Court may recognize and grant full faith and credit to Mississippi Court judgment provided Purcell, Diamondhead Utility Co., Inc. and Diamondhead Utilities are party defendants.[3]

5-8. *Walter J. Gex, III Factor.* (Undisclosed Easement Servitude.)

The law firm of Gex, Gex and Phillips ("Gex Firm") executed many legal services in and for Diamondhead developer prior to and after Walter J. Gex, III resigned from the Gex Firm and assumed a Federal Judgeship on February 27, 1986.

The issue is whether Gex family interest secretly retained easements for egress and ingress to property south of U.S. Interstate 10, Exit 16.

Petitioners filed a Memorandum on April 30, 1992 outlining status of litigation as of that date (App. 86). Pursuant to Local Rules, opposing counsels do not receive a copy of any Memorandum (App. 82 and 83). Simply stated, if Gex interests reserved certain easements

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[3] *Purcell Co., Inc. v. Mississippi State Tax Commission*, 569 So.2d 297 (Miss. 1990).

in sale of Gex property to developer and, in turn, developer did not state this exclusion of certain easements reserved to Gex in warranty deed relative to sale, exchange or transfer of property to Diamondhead Country Club and Property Owners Association, Inc. ("POA") and others, land sales were deceptive, and fraud has occurred (App. 89 and 90).

SUMMARY OF JUDGMENT BELOW

United States Magistrate Judge John M. Roper should have disqualified himself. 28 U.S.C. § 455. Notwithstanding, all plaintiffs should have been dismissed from Class Action without prejudice. As to those going forward individually, amendment of Complaint to add party defendants should have been allowed.

Petitioners were faced with extraordinary circumstances in order to follow the Court's Scheduling Order to the detriment of clients. Petitioners, not the Court, are privileged to amend when authorized, and they shall designate party defendants. Dismissal of same can only be allowed after an evidentiary hearing on a Motion to Dismiss.[4]

ARGUMENT

Subsequent to final judgment, petitioners filed a Motion to Vacate Judgment on April 30, 1992 (Vol. 7 of

[4] FRCP Rule 15, 28 U.S.C.A.; FRCP Rule 16(b), 28 U.S.C.A.; FRCP Rule 41(b), 28 U.S.C.A.; *Transit Cas. Co. v. Security Trust Co.*, 396 F.2d 803, *cert. denied*, 89 S.Ct. 635 (Ca. Fla. 1968).

Record). FRCP Rule 60(b)(2)(3)(6), 28 U.S.C.A., which Motion was denied.

Allegations of misrepresentation of land sales contracts due to secret retained easements by Gex family interests to the detriment of developer and his vendees should have triggered an evidentiary hearing to avoid injustice and piecemeal litigation.

Examination of Condition No. 5 of POA Open Board Meeting held September 13, 1990 indicates that Gex family reserved easements necessary for access to and from Diamondhead property south of I-10, Exit 16. (App. 89, 90). The implication is plain. Upon conveyance of unitized property to developer, Gex family did not release said easements; and, developer sold property and assessed dues from property owners south of I-10, Exit 16. Developer in turn failed to indicate Gex reservations of easements in warranty deed representing land sales in Diamondhead, Hancock County, Mississippi ("Diamondhead"). Upon transfer of amenities to POA by developer, reservation of easements was undisclosed; and if disclosed by developer, was not made known to POA dues paying members.

It matters not that Walter J. Gex, III is now a United States District Judge. Prior thereto, he was in private practice of law, doing business with and performing legal services for the developer.

If an easement reservation can be kept secret for such a long time, it is reasonable that there are other secret matters and counterletters between developer and initial land owner sellers that have not been made known.

CONCLUSION

Judgment below should be reversed and litigation remanded with instructions for a new trial with designation of an out of state judge to hear this litigation.

Respectfully submitted,

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Attorney for Petitioners
Henry J. Guidry, Jr.
and Henry C. Melius

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

E.E. JEANSONNE, et al.	)	
vs.	)	Docket No. S90-0094(R)
MISSISSIPPI UTILITY, INC., et al	)	

ORDER OF REFERENCE

(Filed May 15, 1990)

IT IS HEREBY ORDERED that the above-captioned matter be referred to United States Magistrate John M. Roper for the conduct of all further proceedings and entry of judgment in accordance with 28 U.S.C. § 636(c) and the foregoing consent of the parties.

/s/ Dan M. Russell, Jr.
UNITED STATES
DISTRICT JUDGE

May 14, 1990
Date

Consent to Disposition of Civil Case
by a Magistrate (Appeal to Circuit)

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF MISSISSIPPI

E.E. JEANSONNE, et al. Plaintiffs	)	Docket No. S90-0094(R)
vs.	)	
MISSISSIPPI UTILITY, INC., et al Defendant	)	

CONSENT TO PROCEED BEFORE A
UNITED STATES MAGISTRATE

(Filed May 9, 1990)

In accordance with the provisions of 28 U.S.C. § 636(c), the parties to the above-captioned civil matter hereby waive their right to proceed before a Judge of the United States District Court and consent to have a United States Magistrate conduct any and all further proceedings in the case (including the trial) and order the entry of a final judgment.

/s/ W. Manion W. J. MANION	Attorney for Class Action Plaintiffs
/s/ Virgil G. Gillespie	Attorney for Artis James, Hobart Truesdale and M.P. McLean
/s/ Walter J. Phillips	Attorney for Mississippi Utility, Inc. and Peter J. Casano

NOTE: Return this form to the Clerk of Court only if it has been executed by all parties to the case.

UNITED STATES DISTRICT COURT
OFFICE OF THE CLERK
SOUTHERN DISTRICT OF MISSISSIPPI

MEMORANDUM

To: Attorneys of Record Date: 12-20-91

From: J. T. Noblin, Clerk

Subject: S90-0094(P)
Jeansonne
Vs.
Mississippi Utility, Inc.

Pursuant to the directive of the Court regarding the initial reassignment and distribution of cases to Judge David C. Bramlette, III, the captioned cause has now been reassigned to Judge Bramlette and the case number has been changed to:

S90-0094(Br)

Please indicate this reassignment for your file and utilize the new case number on subsequent pleadings and correspondence.

Thank you for your cooperation in this regard.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

E. E. JEANSONNE, ET AL Class Action Plaintiffs versus MISSISSIPPI UTILITY CO., INC., ET AL. Class Action Defendants	*	CIVIL ACTION NO. S90-0094(P) MAGISTRATE ROPER FILED 2-16-90 UNITED STATES MAGISTRATE April 09-91 RECEIVED

STATUS CONFERENCE MEMORANDUM

Answers filed by defendants indicated that Mr. Hobart G. Truesdell, II, defendant, was a member of Purcell Co., Inc. Board of Directors; and, as Operating Trustee of Purcell Trust 1 & 2, he was subject to the jurisdiction of the United States Bankruptcy Court, Southern District of New York. This Court granted a motion to continue without date Class Action proceedings, subject to classification of defendants' status in the bankruptcy court proceedings.

On February 16, 1990, a complaint for enrollment pro hac vice and for an order re-opening the McLean Industries, Inc. Chapter 11 bankruptcy proceeding was filed. The complaint was dismissed without an appearance or hearing, based on lack of subject matter jurisdiction as all defendants in the filed complaint were not debtors.

An intervention was filed on July 27, 1990 and dismissed for the same lack of subject matter jurisdiction, and a motion for sanctions was reserved by the Court.

A notice of appeal to the United States District Court, Southern District of New York, was timely filed.

Due to limited hours that the Bankruptcy Court record room is open due to lack of funds and necessary remodeling, duplication of records required to designate an appeal has been delayed, but that will be shortly remedied.

STATUS OF BANKRUPTCY APPEAL

The Bankruptcy Court has refused to "Investigate the *circumstances* surrounding the sale of Diamondhead Utility stock . . . since the stock was never the property of the debtors' estate, rather the Purcell stock was included in the debtors' estate." (Transcript of hearing held on October 11, 1990, Pages 25, 26, 27)

The Bankruptcy Court ordered liquidation of Purcell Co., Inc. ("Purcell") with transfer of all stock to Purcell Trust ("Trust"). The object of the liquidation is to allow for sale of Purcell's lots and property in the Diamondhead community, Hancock County, Mississippi, with dedication of the net sales to the Trust in and for the benefit of the McLean Industries bankruptcy Chapter 11 creditors.

In order to sell lots and property, adequate water and sewer services are required. *Purcell Co., Inc. v. Mississippi State Tax*, 569 So.2d 297 (Miss. Oct. 1990). Neither Purcell or Diamondhead Utility Co., Inc. ("Utility") furnished adequate water and sewer services as far back as 1985, and these deficiencies were never disclosed to purchasers of Diamondhead property.

Intervenors' position in the bankruptcy is that Diamondhead Water and Sewer District has borrowed in excess of $3.2 million to construct a safe sewerage system which Diamondhead property owners must repay. The payment of this bonded indebtedness to construct a sewer treatment plant in Diamondhead is an infusion of capital post-petition security interest after the Chapter 11 filing date sufficient to obtain equitable relief under provisions of 11 U.S.C. § 1129(b), (b)(2)(B)(ii); *In Re Henke*, 90 B.R. 451 (Bankr. MT 1988).

The Court is reminded that Purcell pays no dues to the Diamondhead Property Owners Association and pays no fees for water and sewer services until the vacant properties are sold.

In summation, the Diamondhead property owners have a security interest in the form of bonded indebtedness to build a sewer treatment plant, the cost of which was and is the obligation of the debtors in the bankruptcy action.

Respectfully submitted,

/s/ W. J. Manion
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Pro Hac Vice
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No copies of this Memorandum
have been furnished to
opposing counsel

Excerpt from Court's Notice of Conference pursuant to Docket entry 117, page 926 of Record:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

****

CIVIL JURY AND NON-JURY
PRETRIAL/SETTLEMENT CONFERENCES
MONDAY, JULY 13, 1992
AND
TUESDAY, JULY 14, 1992

****

The following civil jury and non-jury cases in the Southern Division of this District are set for ***PRETRIAL/ SETTLEMENT CONFERENCE*** and will be heard before Judge David C. Bramlette and Judge John M. Roper on Monday, July 13, 1992, and Tuesday, July 14, 1992, beginning at 9:00 a.m. in the Federal Building, Courtroom No. 4, 725 Washington Loop, Biloxi, Mississippi. Please see the attached list for the time of your conference.

* * *

Counsel are instructed to submit to Judge Roper, P. O. Drawer 1164, Biloxi, MS 39533, with a copy to Judge Bramlette, P. O. Box 1389, Biloxi, MS 39533, on or before ***Monday, July 6, 1992***, a memorandum (3 page maximum) setting forth a brief explanation of the case, and a candid appraisal of the respective positions, including possible settlement figures. *This document is not to be exchanged and will be viewed only by the Court.* The memorandum will *not* become a part of the Court file and will be destroyed upon the exhaustion of settlement negotiations.

Found at Page 1312 of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

E.E. JEANSONNE, ET AL PLAINTIFFS

VS. CIVIL ACTION NO. S90-0094(BR)

MISSISSIPPI UTILITY INC., ET AL DEFENDANTS

ORDER

(Filed Aug. 31, 1992)

This cause comes before the Court on motion of the Plaintiff for "release of correspondence". The Court, having reviewed the motion and attached affidavit, is of the opinion that the motion is not well taken and shall be denied. It is therefore,

ORDERED AND ADJUDGED, that the Plaintiffs' motion for "release of correspondence" be, and is hereby, denied.

SO ORDERED AND ADJUDGED, this the 31st day of August, 1992.

/s/ John M. Roper
UNITED STATES
MAGISTRATE JUDGE

Excerpts of Status Conference held May 9, 1990 found in Transcript filed in Volume #4 Docket Entry No. 91.

* * *

[p. 14] MR. MANION: Yeah, it's written here. They have it. They've got it. If it's a conflict of law then you have to go –

THE COURT: It's not this Court's decision. If they decide they've got it, they've got it until some higher court tells them they don't.

MR. MANION: Sure. All right, sir. Well, basically, I would like to have status quo until I get myself up there to go up there –

THE COURT: Well, I don't know what's planned. Is anything planned by either side?

You just heard you can dismiss as far as Mr. Phillips' clients are concerned, but I'm not sure that helps you any.

MR. MANION: Well, basically, I have a motion to implead Mississippi Utility – I'm sorry – Diamondhead Utility as an additional defendant and that hasn't been acted on by the Court yet. I have a motion before you and I'd like to serve – I'd like to complete that, get those answers back, and then be prepared for the 18th to go up and bring them a bouquet up there.

THE COURT: All right.

MR. MANION: Thank you, sir.

THE COURT: I don't know what else is going to happen now. I assume that – who represents Diamondhead [p. 15] Utility, who are they? Do you know – does anybody know?

MR. CASTANO: (Casano) Well, I'm not sure they're properly a defendant yet but Walter (Phillips) will represent them.

MR. MANION: Before or after, that's the thing. You've got them operating in two spans of time, one before they were sold and now it's a doing business as since Mr. Castano purchased it.

MR. CASTANO: (Casano) It's not doing business as, it's a corporation. It's the same intact as it was from time from the beginning.

THE COURT: The only question as whether or not they can be made a party is whether it's timely, and the court's probably going to allow it. Whether they're a proper party has nothing to do with whether they're made a party, they can always file a motion to dismiss.

MR. PHILLIPS: Well, sir, they have not been made a party yet.

THE COURT: All right. Well, if they are I will probably allow that amendment. But I don't know, I don't see where we're really going and accomplishing anything. You've got one defendant – three defendants who are going to oppose the motion to dismiss. There's got to be a formal hearing on that. You've got one who is not going to oppose it but you're going to bring in another party which seems to be a part of their operation at

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION (BILOXI)

E E. JEANSONNE, et al — Plaintiffs

versus — Civil Action No. S90-0094 (BR)

MISSISSIPPI UTILITY, INC., et al — Defendants

United States Magistrate Judge
April 30, 1992
RECEIVED

MEMORANDUM DUE ON OR BEFORE MAY 4, 1992

In response to your Judgment dated February 26, 1992, I was aware that it was necessary to amend and go forward on or before March 17, 1992. Your failure to sign Order to Amend Complaint, once authorized by your Minute Entry, was reversible error based on abuse of discretion standard.

A second Notice of Appeal to the United States Court of Appeals for the Fifth Circuit was filed on March 6, 1992 asserting aforesaid Judgment was final; and, if not, was interlocutory in nature, falling within the rarely granted exception of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949).

Additionally, it was urged that your judgment of February 26, 1992 should be set aside if a reasonable person would have considered that your personal interest in the Class Action brings your impartiality into question. *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988); *In Re Corrogated Container Antitrust Litigation*, 614 F.2d 958, 960-61 (5th Cir. 1980).

Even if the above was academic, current events have brought into focus the fact that the Class Action should never have been lodged in the Federal Courthouse, Biloxi, Mississippi, as long as Judge Gex was presiding therein and certainly not after September, 1990.

At certification of Class hearing, I directed your attention to the problems centered around the authority of Phase I property owners over others to no avail. You accepted Mr. Walter Phillips' persuasion. I have filed a Motion requesting an Order issue vacating your February 26, 1992 Judgment based on newly discovered evidence relative to null exchange of easements between Gex family and Diamondhead Country Club and Property Owners Association dated September 13, 1990. F.R.C.P., Rule 60(b)(2)(3)(6), 28 U.S.C.A.

Being domiciled in Louisiana, I first learned during early April, 1992 of this easement exchange from a conversation with Mr. Henry James Floyd, a Diamondhead Phase II property owner. Mr. Floyd has submitted an Affidavit on file with the United States Court of Appeals for the Fifth Circuit attesting to these facts.

With a null easement in hand, Gex family have proceeded to denude the area about the nursing home entrance to Gex Drive. This will ultimately be an environmental conflict.

The most serious misrepresentation and ultimate consequence of easement exchange is the realization that Diamondhead Properties, Inc., Diamondhead Corporation, and their successor, Purcell Co., Inc., never had perfected an easement to acquire ingress and egress to the Diamondhead property advertised and sold South of

the exit from U.S. Interstate 10 Highway; and, if a perfection occurred, said perfection was never conveyed to the Diamondhead Country Club and Property Owners Association.

There exists a consummate realization that this Class Action litigation has taken a turn and misdirection not anticipated when filed. It is not desirous that the judiciary be discredited. The best solution to defuse the circumstances existing is for this Court to recall its Judgment dated February 26, 1992 and authorize a change of venue out of this district.

I hope my comments have been constructive and accepted in good faith as written.

Respectfully submitted,

/s/ W. J. Manion
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La. Bar No. 9089 4-27-92

WJM/dg
No Copies Issued

Excerpts from Plaintiffs' Motion To Vacate Judgement (F.R.C.P., Rule 60(b)(2)(3)(6), 28 U.S.C.A. filed 30 April, 1992 – Volume 7 of Record, page 1236 et seq., referring to Diamondhead Country Club and Property Owners Association Open Board Meeting dated 13 September 1990:

* * *

There is before the Board a request from the Walter Gex family that we grant them an entrance onto Gex Drive from their property located on the Northwest side of the interchange between the Century 21 office and the Episcopal Church. On 19 March 1986 a motion passed to allow no additional ingress or egress to Gex Drive.

Motion by O'Barr, seconded by Wood, that we recind the action passed by the Board on 19 March 1986 concerning ingress and egress on Gex Drive. All members present voting YES, proxy on file from Keen voting YES. Passed unanimously.

Motion by Wood, Seconded by Edwards, that we grant the easement based upon the conditions set forth by this Board subject to the acceptance of these conditions by the Gex Family. All members present voting YES, Proxies on file from Claggett and Keen voting YES. Passed unanimously.

Conditions set forth as follows:

1. they pay all costs of the entranceway and modification of neutral grounds.

2. Only one entraceway (opening) will be allowed.

3. Construction traffic and delivery trucks will use Jones Road until occupancy of the project.

4. 50 foot easement, for entranceway, beginning 650 feet South of the North boundary of the Gex property.

5. The Gex family will grant permanent easement to the POA for access to the POA property South of I-10.

6. These conditions and restrictions are to become part of the easement.

* * *

The meeting was then opened to questions from the floor. There was a great deal of discussion on the Gex Drive easement. Mr. Walter Gex was in attendance and presented his position, and answered questions.

Respectfully Submitted,

/s/ Brieriey A. Acker
Brieriey A. Acker
Secretary